IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898

CITY OF RICHMOND, APPELLANT,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

No. 264.

MOTION OF THE CITY OF RICHMOND TO ADVANCE THE CAUSE UPON THE DOCKET.

To the Honorable Judges of the
Supreme Court of the United States:

The city of Richmond respectfully shows to the Court that it is the appellant in the above styled cause, which is upon the docket of this court—that it hereby submits to this Honorable Court a motion, that the said cause be taken out of its place upon said docket and advanced upon said docket so that it may be heard as soon as this court shall deem reasonable and proper—that in order to have such early hearing the Court will designate a day upon which said cause may be heard by this Court, and that proper notice may be given to all parties of such determination and designation.

The said city, in support of said motion, herein submits a statement as to the material facts shown in the record of said cause filed in this Court, and its reasons in support of said motion.

This cause is here upon a writ of *certiorari*, bringing up the decree of the Circuit Court of Appeals of the United States for the Fourth Circuit in the above-styled cause and the record thereof.

The appeal in this case to the United States Circuit Court of Appeals for the Fourth Circuit was taken from a decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 23d day of August, 1897, in the suit therein pending of Southern Bell Telephone Company v. City of Richmond.

By said decree it was adjudged that the said company has under the protection of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights."

STATEMENT OF CASE.

On July 24, 1866, Congress passed the act above mentioned "to aid in the construction of telegraph lines," &c., and provided therein as follows: "Any telegraph company which was then organized, or might thereafter be organized, under the laws of any State, and which should file a written acceptance with the Postmaster-General of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph, over and along any of the military roads and post-roads of the United States which had then or might thereafter be declared such by law."

On the 11th day of December, 1879, the appellee was chartered as

a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a certain contract with the Western Union Telegraph Company acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the subject of this litigation are set forth in the record of this case upon pages 60 and 66. By article 1, section 1 of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company, and the Ormes contract afterwards became the property of the Southern Bell Telephone and

Telegraph Company. See record, p. 75. On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. See record, p. 75. And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 66 to 75, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 31. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone exchange or plant was established by the complainant. No poles were erected or wires run by said company, except under the said ordinance. (See answer, page 43, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for

the support of wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant, page 7.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. Page 43.

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 15 to 18.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office of the Western Union Telegraph Company by telephone wires, and there connected with three sets of telephones received from the American Bell Telephone Company and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company desiring to send a telegram over the Western Union lines calls up the Western Union office through his 'phone. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of

Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 85.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits. (See p. 88, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit "a general ordinance as to telephone conduits." See p. 88. That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for tele-

phonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition and that the wires were properly fastened and properly insulated, so as to prevent the causing of a fire by the escape of electricity. The Council also reserved the right to put other restrictions and regulations as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See p. 18 to 26, record.)

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials.

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit

Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

PLEADINGS.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an office or telephone exchange connected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said

subscribers do, transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond, and other States and the District of Columbia and foreign countries, and it is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and

necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24th, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post-roads of the United States, and that the streets, alleys and highways of the city of Richmond are among such post-roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to contruct and maintain said telephone lines under section 1287 of the Code of Virgina (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines without regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884, after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K;" that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreements with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, as to the joint use of poles. It alleges that threats were made by some of those in authority in said city that,

unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of the repeal ordinance of December 14, 1894, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with

its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null* and *void*."

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revocation. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer.

On January 24, 1897, the court filed an opinion overruling the demurrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of complainant. It denied that the said wires, poles and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats hav-

ing been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10, 1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the circumstance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved September 10, 1895. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a latter date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit H with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender

before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 51 to 88; and a statement of agreed facts from pages 88 to 90. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree "in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree."

The city duly filed its petition of appeal from said decree of August 23d, and stated its assignment of errors as follows:

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same, and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statue of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7th. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as Exhibit "G" with the bill of complaint, or in any of its provisions.

The appeal to the Circuit Court of Appeals for the Fourth Circuit was decided on February 1st, 1898. In the opinion of the majority of the Court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows:

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of

Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. (*Mugler* vs. *Kansas*, 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of or impose any unnecessarily restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. (*Lawton* vs. *Steele*, 152 U. S. 137.) If this be the case with regard to the Legislature, *a fortiori* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The 7th section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of

the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2.00 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan* 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

REASONS FOR MOTION TO ADVANCE.

The said city, in submitting said motion, offers the following reasons why the said cause should be advanced, and an early day fixed for its hearing:

First. The questions involved are of great importance to all the municipalities of this nation, because they most materially concern the extent and the limits of their power over the construction and operation of telephone companies in their midst.

Second. As the questions are of such great interest to so many governmental bodies it is most desirable, if not absolutely necessary, to have said questions settled speedily as well as authoritatively.

Third. Municipal government, not being for private gain or interest, but for the public good, should, it is respectively submitted, be entitled to some preference in matters seriously affecting the performance of its duties and the proper exercise of its power. Governmental agencies, in cases affecting the performance of delegated duties, should have precedent over private causes, since they affect the interests of so many.

Fourth. While outside of the Fourth Circuit the decree complained of in the Circuit Court of Appeals for that circuit is only persuasive authority, yet it is the declared law of every city and town in States of Maryland, Virginia, West Virginia, North and South Carolinas, which are embraced in said circuit. We submit that so wide-reaching a decision, affecting the exercise of governmental powers in so many municipalities, should be finally passed upon by this Court as soon as possible.

Fifth. The questions involved are also of great importance to all of the telephone companies. If the decision in this case is the law of the land, many of them are submitting to restrictions, limitations and burdens, which the lower courts in this case have declared is in violation of the rights conferred by an act of Congress.

Sixth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Seventh. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz.: messages which never left the limits of the city, much less the limits of the State.

Eighth. The Circuit Court of Appeals erred in holding that,

although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884—yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Ninth. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

Tenth. The said city respectfully represents that it is entitled to an early final decision of the questions involved in this cause. As a city it has had delegated to it powers affecting the interests of nearly one hundred thousand people. It should not be improperly restrained from the exercise of those powers. If its views and contention as to said questions are correct, it has been since the 6th day of October, 1896, restrained and prevented from the exercise of certain of its powers, bearing most materially upon its control over snd management of its highways. It was on that day enjoined as set forth in the above statement of facts. Therefore the city has not merely suffered some wrong in the past, but by said injunction and the decrees complained of, is daily suffering a wrong, and will continue to do so until this court shall finally decide this cause. For about two years the appellee company has, in opposition to the ordinances of said city, been occupying its streets with its poles and wires. It has during that time, of its own will and against the consent of the city, put up many new poles and wires wherever it has seen fit. It is true that it has notified the city of its intention from day to day, but such notification was useless in the light of the decrees here complained of.

Eleventh. As long as said decrees stand unreversed the said city is unable to deal justly with any other telephone company desiring to use its streets or highways under contracts set forth in proper ordinances. There is now a telephone company in operation in said city under the terms of the ordinance of September 10, 1895, filed as Exhibit "G" with the bill in this cause. While the said company complies with the terms of said ordinance, yet the city feels that it is not fair to have one company under said terms and the appellee company existing of its free will, unrestrained by any present ordinance, such being the result of the decrees of the lower courts. It is

true that the said company has not conformed to the conduit ordinance filed as Exhibit "H," the reason being that the city has felt that it would be unjust to enforce that ordinance against said company while the appellee company cannot be brought within its terms.

Twelfth. The appellee company cannot object to an early hearing by this court, for the reason that its present uncertain tenure must affects its finances unfavorably.

In submitting this motion the said city does not cite any of the authorities showing errors in the decrees of the lower courts, for the reason that it believes that such questions are not considered upon this motion. But if the Court should deem such questions pertinent to this motion, then the said city asks the Court to examine the brief filed by it with its petition for a writ of *certiorari*. The said brief fully discusses the said errors complained of.

For the reasons above given the city prays that its motion to advance may be granted.

THE CITY OF RICHMOND,
By HENRY R. POLLARD,
City Attorney.